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80-1175

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Elias Martinez, Petitioner,

v.

United States of America, Respondent.

PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

R. Roscoe Haley
4309 N. 10th Suite A
McAllen, TX 78501
(512) 631-5497

Counsel for Petitioner

## QUESTIONS PRESENTED

I. Whether testimony comprising an actual conflict of interest on the part of the trial counsel for a defendant is so pernicious as to influence a jury in other counts of a multiple count indictment and so require reversal as to all counts.

II. Whether the right to conflict-free representation is so basic as to require a positive participation on the part of the trial court in assurring a knowing and intelligent waiver on the part of a defendant.

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ELIAS MARTINEZ, by his undersigned counsel, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINION BELOW

The opinion of the Court of Appeals (App. A, infra) is reported at ___ F.2d 1083.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1980. The time within which to file the petition will expire on January 13, 1981, pursuant to revised Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## STATEMENT

The relevant facts are simple and are fairly set forth in the opinion below. Defendant Elias Martinez was convicted in the United States District Court for the Southern District of Texas, James DeAnda, District Judge, on seven counts of distributing or conspiring to distribute

heroin in violation of 21 U.S.C. §§841(a)(1) and 846. The lead witness for the government, one Alonso Quintanilla, Jr., appeared as a surprise witness to Martinez and to his trial attorney, Matias Morin, in that Quintanilla had not been named in a list of government witnesses which had been provided earlier by the government. Martinez appealed his conviction on the sole contention that he had been denied in his right of confict-free representation under the sixth amendment to the constitution, particularly as his attorney had immediately informed the trial court that he felt he would be unable to freely question Quintanilla, since he had represented him on charges stemming from the same transactions forming the basis for some of the counts pending against Martinez and that he

believed that such cross-examination of Quintanilla would of necessity include some of the information supplied to him in the course of the prior representation as a part of the confidential communications from his former client. The trial judge, deciding that the prior representation had concluded, directed Morin to proceed. The Court of Appeals reversed those counts which directly involved the testimony of Quintanilla, holding that there had been no effective assistance of counsel with regard to the cross-examination of Quintanilla, particularly inasmuch as Martinez had not waived his right to such assistance.

## REASONS FOR GRANTING THE WRIT

This case represents but one aspect of a torturously long history of cases involving the multiple representation of

parties or parties and witnesses in the trial of criminal cases. The fact that many cases have been brought on appeal regarding this practice and the difficulties it entails speaks eloquently of the need for the pronouncement of a more uniform standard in multiple representation cases, a clear delineation that the trial courts may follow to avoid prejudicing the defendant's right under the sixth amendment to conflict-free representation. Furthermore, where the chief testimony against the defendant was that of the lead government witness and such testimony is of a highly inflammatory nature so as to affect the minds of the jury unduly, a partial reversal as here of only those counts directly involving such government witness does not cure the violation of the defendant's rights

to a fair trial free from conflict on the part of his counsel. To pretend otherwise is to ignore the reality involved on the part of a jury, a reality which has certainly been dealt with by this Court in the case of jury instructions, for example. See Bruton v. United States, 381 U.S. 123, 135-37 (1968); Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). If it is clear to this Court that the instructions of a trial court to ignore inflammatory or prejudicial matter may be insufficient to assure a fair trial, it is quite logical that the effect of highly prejudicial testimony upon the minds of the jury regarding all the counts of a multiple count trial will be substantial, as it will tend to color their view of the defendant upon all counts,

not merely those involving the testimony itself. In fact, this was recognized by the government prosecutor at the time the question of the conflict arose at the beginning of the original trial, when the trial judge asked the prosecutor if he could make his case without Quintanilla, and the prosecutor answered "No, sir. We were going to put Quintanilla on first, as a matter of fact." Trial transcript, page 4. It is clear that the government did not believe that the testimony of Quintanilla would only go to three of the seven counts--and yet, the Court of Appeals feels it can separate the counts into discrete parts, letting some stand in spite of the prejudicial impact this sort of evidence would have on any real-life jury. Such a problem will obtain in any such case where there

is such obviously inflammatory testimony, particularly where there is no indication to the jury at trial to moderate or to disregard the impact of such testimony as it relates to other charges being tried.

Certiorari should also be granted to establish the proper procedure when there arises a question as to the defendant's ability to receive conflict-free representation. Following the Court's decision in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), the Fifth Circuit court itself set forth the opinion that the trial judge should affirmatively participate in the waiver decision of the defendant when there is a situation involving a conflict of interest. United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978). However, in this

case the circuit court itself, while noting that the trial court had not followed the standard set forth in Alvarez, by its decision to reverse only part of the counts did not apply a strong enough remedy to assure that trial courts would henceforth use sufficient care to preclude the denial of effective assistance of counsel where there are multiple counts against the defendant. Only by setting a precedent sufficiently strong can the trial courts be properly guided to ascertain carefully whether there is in such cases a conflict of interest, and if there is a sufficiently strong possibility of such conflict whether the defendant knowingly and intelligently waives his right to conflict-free representation. The status of the sixth amendment as a basic right under our

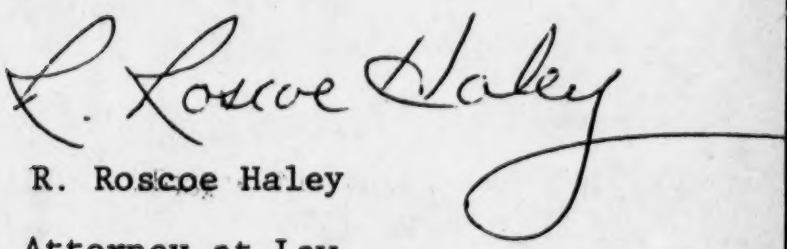
laws has been unquestioned; here, the Court is presented with the opportunity to clarify a major area in which such a basic right can be assurred in a clear and convincing fashion that can be easily followed by the trial courts of the country. In fact, where, as here, there develops in a timely fashion an issue of a possible conflict of interest, there should be a procedure for the trial court to halt further proceedings to determine if such conflict exists and, if so, whether the defendant is aware of it and if he waives his right to representation free of conflict. Alvarez, supra. Such a rule on the part of this Court would be easy for a trial court to apply, would entail minimal expense or delay, and would help assure the observance of the sixth amendment right for defendants.

Furthermore, such a rule can only be effectively enforced in cases such as this when an automatic and complete reversal or, at the least, reversal and remand for a new trial is the standard applied.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



R. Roscoe Haley
Attorney at Law
4309 N. 10th Suite A
McAllen, TX 78501
(512) 631- 5497
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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UNITED STATES of America

Plaintiff-Appellee

v.

Elias MARTINEZ,

Defendant-Appellant

No. 79-5558

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Nov. 13, 1980

Defendant was convicted in the United States District Court for the Southern District of Texas, James DeAnda, District Judge, on seven counts of distributing or conspiring to distribute heroin, and he appealed. The Court of Appeals, Gee, Circuit Judge, held that defendant did not receive effective assistance of counsel with regard to cross-examination

of a witness whom the attorney had previously represented on charges related to defendant's and, since defendant did not waive his right to such assistance, counts as to which the witness' testimony was relevant were required to be reversed.

Affirmed in part, reversed in part.

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Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, GEE, and REAVLEY, Circuit Judges.

GEE, Circuit Judge:

Defendant Elias Martinez appeals his criminal conviction on the ground that he was denied effective assistance of counsel. Martinez was tried on seven counts of distributing or conspiring to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1), 846, and he was represented by

retained counsel, Matias Morin. Among the witnesses against Martinez was Alonso Quintanilla, Jr., who figured in three of the counts upon which Martinez was tried. Quintanilla had previously been convicted on a heroin charge arising out of the same transaction as underlay one of the counts against Martinez, and the government had dismissed another charge against Quintanilla that involved the same events as another of Martinez' counts. The attorney who represented Quintanilla on these matters was also Matias Morin.

As Martinez' trial was about to begin, Morin observed that Quintanilla was in the courtroom as a witness for the prosecution, which was a surprise to him because Quintanilla's name had not been on a list of government witnesses that the prosecution had provided him. As soon

as the court convened, Morin informed the judge that he had previously represented Quintanilla on charges related to the defendant's, that he would feel uncomfortable cross examining Quintanilla because to do so thoroughly would require him to broach matters that Quintanilla had told him in confidence, and that this discomfort might impair his effectiveness in representing Martinez. The court, however, instructed Morin to proceed to trial and to question Quintanilla vigorously because the charges against Quintanilla had been resolved and Morin's representation of him completed and thus Morin had no conflict of interest that might impair his representation of Martinez. Morin complied with the court's directive and, at the appropriate time, cross examined Quintanilla. Martinez was

convicted on all seven counts and was given concurrent sentences for each of ten years imprisonment followed by four years special probation. We find that the defendant's convictions on some of the seven counts cannot stand.

The rule in this circuit is clear: if a criminal defendant is represented at trial by an attorney, either appointed or retained, who labors under an actual, and not merely a potential, conflict of interest, the defendant has been denied effective assistance of counsel as a matter of law; and, unless he has knowingly and intelligently waived his sixth amendment right to conflict-free representation, reversal is automatic. No prejudice need be shown. Stephens v. United States, 595 F.2d 1066 (5th Cir. 1979); Zuck v. Alabama, 588 F.2d 436 (5th Cir.), cert. denied, 444 U.S. 833, 100 S.Ct. 63,

62 L.Ed.2d 42 (1979); United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978). Although we have previosly applied this rule where a defendant's attorney concurrently represented a prosecution witness at trial, Stephens, supra; Alvarez, supra, we apparently have not yet applied it where the attorney only previosly represented such a witness. We do so now, however, on the facts of the present case.

The defendant's attorney informed the court that effective representation of his client would compel him to violate confidences that had been entrusted to him by his prior client and that he was reluctant to do so. By his own admission therefore, Morin perceived--and rightly so--that he had a duty to Quintanilla to preserve the latter's confidential communications; and he felt that this duty,

coupled with his commitment to Martinez to serve "as a vigorous advocate having the single aim of acquittal by all means fair and honorable," Porter v. United States, 298 F.2d 461, 463 (5th Cir. 1962) presented him with an actual conflict of interest. Since Morin explained his predicament to the court as soon as he became aware of it and not, for example, in a belated motion for mistrial after he had already cross examined his former client, see United States v. Cochran, 499 F.2d 380 (5th Cir. 1974), cert. denied, 419 U.S. 1124, 95 S.Ct. 810, 42 L.Ed.2d 825 (1975), we have no reason to doubt his sincerity. The record of Morin's cross examination of Quintanilla, moreover, strongly suggests that Morin--torn between conflicting duties--in fact found it necessary to trench upon the confiden-

tial relationship between himself and Quintanilla.[1] While the record thus appears to disclose that Morin in fact interrogated Quintanilla quite vigorously for the benefit of Martinez, we cannot be sure that, because he failed to pull some punches, he refrained from pulling others. And even could we be sure, our precedents establish that a lack of actual prejudice is irrelevant if an actual conflict of interest obtains.

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[1]Consider, for example, the following passages of their dialogue:

Q (By Morin) Let's go on to these other three ounces that you delivered in September. Didn't you at one time tell me you got these three ounces from a man in Reynosa?
A (By Quintanilla) No.
Q Did you ever tell me where you got these three ounces?
A No, just now.
Q This is the very first time you told me where you got these three ounces, is that correct?
A Yes.

We conclude, therefore, that Martinez did not receive effective assistance of counsel with regard to the cross examination of Quintanilla.[2] It is clear, moreover, that Martinez did not waive his right to such assistance:

> In order for a defendant effectively to waive his right to conflict free counsel, the trial judge should affirmatively participate in the waiver decision by eliciting a statement in narrative form from the defendant indicating that he fully understands the nature of the situation and has knowingly and intelligently made the decision to proceed with the challenged counsel. United States v. Garcia, 517 F.2d 272 (5th Cir. 1975);

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Q Let me ask you, didn't you at one time give me a written statement telling me where you got those three ounces?
A Yes, I had given a writ, but the owner had not signed as to who those ounces belonged to.
Q What did you state in that written statement you gave me?
A I don't remember any more.
Q Do you remember anything?
A No.
Q Do you remember mentioning any

see also Gray v. Estelle, 574 F2d 209, 213 (5th Cir. 1978); United States v. Mahar, 550 F.2d 1005 (5th Cir. 1978).

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names?
A Yes, I do remember a name, but I don't remember the name of the man who went to buy from me at the house.
Q What's that name?
A I don't remember.
Q Do you remember anything else you mentioned in that statement?

. . . . . .

Q Let me ask you, did you mention this man's (indicating (Martinez)) name in that statement?
A No. But you know who it was.
Q His name wasn't there?
A It wasn't. But you know who was there.
Q Where did you sell these three ounces?
A On Tower Road.
Q Who lives there at that place?
A It was a friend who lived there. The place where I made the deal was at the house of one of his brothers.
Q Who was your friend?
A His name is Roberto, but I don't remember his last name.
Q Robert Valdez, would that refresh your memory?
A Yes.

Alvarez, 580 F.2d at 1260: see Zuck, 588 F.2d at 440. Not only does the record fail to show that the trial judge addressed the defendant at all on the subject

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[2]All of the cases that have been brought to our attention in which this court did not find ineffective assistance of counsel where a defense attorney had previously represented a witness, Haggard v. Alabama, 550 F.2d 1019 (5th Cir.1977); United States v. James, 505 F.2d 898 (5th Cir.), cert. denied, 421 U.S. 1000, 95 S.Ct. 2397, 44 L.Ed.2d 667 (1975); United States v. Cochran, 499 F.2d 380 (5th Cir. 1974), cert. denied, 419 U.S. 1124, 95 S. Ct. 810, 42 L.Ed.2d 825 (1975); Nelson v. United States, 415 F.2d 483 (5th Cir.1969) cert. denied, 396 U.S. 1060, 90 S.Ct. 751 24 L.Ed.2d 754 (1970); Harrison v. United States, 387 F.2d 614 (5th Cir. 1968), are easily distinguishable. All were decided prior to United States v. Alvarez, 580 F. 2d 1251 (5th Cir. 1978), which relying on Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), held that if a defendant's attorney had an actual conflict of interest, no prejudice need be shown, and all rested at least in part on the absence of prejudice to the defendant. In all of these cases except Haggard, moreover, the attorney had represented the witnesses on charges unrelated to those for which the defendant was tried.

of waiver, but, since Morin's discussion with the judge was a bench conference, the record does not even support an inference that the defendant was aware that his attorney believed himself plagued by a conflict of interest.

While we find that Martinez' sixth amendment right was violated and that that right was not waived, we do not find that the violation infected the entire trial. Martinez' counsel was constitutionally ineffective only with regard to his cross examination of Quintanilla, and Quintanilla's testimony was conceivably relevant to three counts only of those on which Martinez was tried. We therefore reverse the defendant's conviction on those counts[3] but on those alone.

AFFIRMED in part, REVERSED in part.

[3]The affected counts are those numbered one, six, and seven in the indictment.